

**REMARKS/ARGUMENTS**

Applicants submit this Third Amendment (“Amendment”), accompanied by a Petition for Extension of Time, in reply to the Office Action mailed September 4, 2003.

In this Amendment, Applicants amend the specification and abstract to improve clarity. Applicants also cancel, without prejudice or disclaimer, claim 27 and amend claims 28-43.

Before entry of this Amendment, claims 27-43 were pending in this application. After entry of this Amendment, claims 28-43 are pending in this application.

The originally-filed specification, claims, abstract, and drawings fully support the amendments to the specification, abstract, and claims 28-43. No new matter was introduced.

In the Office Action, the Examiner rejected claims 27, 30-33, 37, and 41 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,262,375 to Engelhardt et al. (“Engelhardt”); rejected claim 38 under 35 U.S.C. § 103(a) as being unpatentable over Engelhardt in view of U.S. Patent No. 4,549,156 to Mine et al. (“Mine”); rejected claim 39 under 35 U.S.C. § 103(a) as being unpatentable over Engelhardt in view of U.S. Patent No. 5,932,523 to Fujikami et al. (“Fujikami”); and rejected claim 43 under 35 U.S.C. § 103(a) as being unpatentable over Engelhardt in view of U.S. Patent No. 6,194,352 to Riley, Jr. et al. (“Riley”).

The Examiner also stated that claims 28, 29, and 34-36 would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

**Allowable Subject Matter**

Applicants gratefully acknowledge the Examiner’s statement that claims 28, 29, and 34-36 would be allowable if rewritten. Applicants amend claims 28, 29, and 34-36 substantially as suggested by the Examiner.

Additionally, Applicants amend claims 30-33 and 37-43 so that they depend directly from amended claim 28. Applicants submit that dependent claims 30-33 and 37-43 are patentable over the cited references including Engelhardt and the other art of record. This is true whether such art is considered alone or in any proper combination, in particular, at least due to their direct dependency from allowable claim 28.

Benefit of Prior-Filed Applications

In the papers filed on February 4, 2000, Applicants indicated that the present application is a continuation of International Application No. PCT/EP98/04991, filed July 28, 1998, in the European Patent Office. Additionally, Applicants claimed the benefit under 35 U.S.C. § 119(e) based on prior-filed, copending provisional application No. 60/059,986, filed September 25, 1997, in the U.S. Patent and Trademark Office (“USPTO”).

In a Preliminary Amendment also filed February 4, 2000, Applicants amended the specification to indicate that the present application is a continuation of International Application No. PCT/EP98/04991, filed July 28, 1998. Additionally, in a Supplemental Preliminary Amendment filed June 16, 2000, Applicants amended the specification to indicate that the present application claims the benefit under 35 U.S.C. § 119(e) based on prior-filed, copending provisional application No. 60/059,986, filed September 25, 1997. Further, in a Second Supplemental Preliminary Amendment filed July 31, 2001, Applicants amended the specification to further clarify both of these claims.

However, the Office Action Summary (PTO-326) of the Office Action mailed September 4, 2003, does not appear to acknowledge these claims. Similarly, these claims do not

appear to be acknowledged in the Office Actions mailed May 7, 2003; May 21, 2002; August 23, 2001; or June 14, 2001.

Applicants respectfully request that the Examiner expressly acknowledge Applicants' claims to the benefit of both the provisional application and the parent PCT application in the next paper mailed from the USPTO.

#### Drawing Status

The Office Action Summary (PTO-326) indicates that the drawings filed on November [20], 2002, were accepted by the Examiner; the proposed drawing corrections were approved by the Examiner; and corrected drawings were required in reply to the Office Action.

This Amendment includes three (3) Replacement Sheets providing corrected drawings for Figs. 3, 4a, 4b, 4c, and 4d.

#### Response to Election of Species Requirement

In the Office Action, the Examiner states "Applicants have submitted no reasoning for the species themselves are not patentably distinct. Therefore, the arguments amount to a mere allegation that the species are not patentably distinct." (Office Action mailed September 4, 2003, p. 2).

Applicants strongly disagree with this mischaracterization of Applicants' position. The Response to Election of Species Requirement filed June 6, 2003, states no position on the patentable distinctness of the proposed species, nor does it allege such a position. Instead, it simply states "Regarding traverse of the election of species requirement, Applicants submit that at least independent claim 27 is generic to all of the proposed species as characterized by the Examiner. Thus, if these or other generic claims are found allowable, Applicants submit that

Applicants are entitled to consideration of all claims dependent from them.” The Examiner has admitted as much in a prior Office Action. (Office Action mailed May 7, 2003, pp. 2-3). And, because Applicants argued that claims 27-43 were patentable over the cited references in the Amendment filed February 25, 2002, Applicants statements are more properly read to imply that the election of species requirement was traversed because independent claim 27 and, thus, dependent claims 28-43 were all patentable over the cited references.

A cursory review of the prosecution history of this application sheds additional light on this election-of-species-requirement issue.

In an Office Action mailed August 23, 2001, Examiner Vu (one of at least five examiners whose names appear on Office Actions for this application) examined the entire application on the merits, including claims 27-43, without any requirement for election of species. In response, Applicants filed an Amendment and other papers on February 25, 2002.

In a subsequent Office Action mailed May 21, 2002, new Examiner Cuneo required an election of species under 35 U.S.C. § 121 between twelve proposed species. In a Reply to Office Action filed November 20, 2002, Applicants pointed that Examiner Cuneo’s characterizations of species did not appear well-founded and requested a reevaluation of the election of species requirement. Applicants also indicated that the search and examination of this entire application could be made without serious burden as demonstrated by Examiner Vu’s Office Action mailed August 23, 2001. Finally, Applicants noted that Examiner Cuneo’s Office Action indicated that independent claim 27 was generic and that dependent claims 28-43 all depend from claim 27 or claims dependent from claim 27. In light of Applicants’ previous arguments that claims 27-43 were patentable over the cited references, this implies that the election of species requirement

was traversed, at least in part, because independent claim 27 and, thus, dependent claims 28-43, were all patentable over the cited references.

In another subsequent Office Action mailed May 7, 2003, new Examiner Norris required an election of species under 35 U.S.C. § 121 between three proposed species. In a Response to Election of Species Requirement filed June 6, 2003, Applicants stated that “Regarding traverse of the election of species requirement, Applicants submit that at least independent claim 27 is generic to all of the proposed species as characterized by the Examiner. Thus, if these or other generic claims are found allowable, Applicants submit that Applicants are entitled to consideration of all claims dependent from them.” Consistent with Applicants’ previous arguments, this implies that the election of species requirement was traversed because independent claim 27 and, thus, dependent claims 28-43 were all patentable over the cited references.

Perhaps, in light of this cursory review, the current Examiner can understand Applicants’ frustration with the repeated shuffling of this application from examiner to examiner, the resultant repetitive requirements for election of species, and the mischaracterization of Applicants’ consistent position as “a mere allegation that the species are not patentably distinct.”

#### Claim Scope

In discussing the specification, claims, abstract, and drawings in this Amendment, it is to be understood that Applicants are in no way intending to limit the scope of the claims to any exemplary embodiments described in the specification or abstract and/or shown in the drawings. Rather, Applicants believe that Applicants are entitled to have the claims interpreted broadly, to the maximum extent permitted by statute, regulation, and applicable case law.

Summary

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and reexamination of this Application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.



Dated: March 3, 2004

By: \_\_\_\_\_  
Lawrence F. Galvin  
Reg. No. 44,694